UNITED STATES DISTRICT COURT
IN THE DISTRICT OF MINNESOTA

Allison Giebel,

Plaintiff,

v.

State Collection Service, Inc., Dean Clinic and St. Mary's Hospital Accountable Care Organization, LLC, "Zach" Doe, an individual, The ABC Corporation and John Doe and Mary Roe, individuals,

Defendants.

Civil Action No. 0:17-cv-00832-RHK-SER

MEMORANDUM OF LAW IN SUPPORT OF THE JOINT MOTION TO DISMISS OF ALL DEFENDANTS

INTRODUCTION

Plaintiff Allison Giebel ("Plaintiff") alleges claims against State Collection Service, Inc. ("State Collection") and Dean Clinic and St. Mary's Hospital Accountable Care Organization, LLC ("Dean Clinic") (collectively "Defendants") under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA") and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*. ("FDCPA") based upon attempts to collect a medical debt Plaintiff owes to Dean Clinic. Plaintiff further alleges that Defendants[1] are liable to her for tortious interference with credit reputation and for defamation.

---

[1] Plaintiff has not identified any of the "Doe" defendants or the "ABC Corporation." Nonetheless, Plaintiff's claims predicated on the alleged conduct of those "individuals" and that "corporation" fail for the same reasons Plaintiff's claims asserted against State Collection and Dean Clinic fail. Accordingly, Plaintiff's claims against the Does and ABC Corporation should also be dismissed.

Defendants move to dismiss each claim set forth in Plaintiff's complaint under Rule 12(b)(6).

FACTS[2]

Plaintiff resides in Minnesota. Pl. Compl. ¶ 4. State Collection is a Wisconsin Corporation that Plaintiff alleges is a "debt collector" within the meaning of the FDCPA, and a "Consumer Reporting Agency" within the meaning of the FCRA. *Id.* at ¶ 5; *see also* 15 U.S.C 1692a(6) (defining "debt collector"); 15 U.S.C. § 1681a(f) (defining "consumer reporting agency"). Dean Clinic is a Wisconsin Corporation. *Id.* at ¶ 7. Plaintiff does not allege that Dean Clinic is a "debt collector" under the FDCPA or that Dean Clinic meets any specific statutory definition within the FCRA. *See gen.* Pl. Compl. Plaintiff does not assert a direct claim against Dean Clinic, but only asserts claims predicated on alleged respondeat superior liability. *Id.* at ¶ 10.

Plaintiff received medical services from Dean Clinic. *Id.* at ¶¶ 11, 23. Plaintiff did not pay for those medical services. *Id.* at ¶ 11. As a result, Dean Clinic placed Plaintiff's debt with State Collection for collection. *Id.* at ¶ 12. Plaintiff does not indicate when State Collection began efforts to collect the debt she owes to Dean Clinic. *See gen.* Pl. Compl. Plaintiff does not allege that she does not owe a debt to Dean Clinic. *Id.*

[2] Defendants accept the facts as Plaintiff has pled them for purposes of this 12(b)(6) motion only. Defendants dispute numerous factual averments set forth in Plaintiff's complaint, and specifically reserve the right to challenge those averments at later stages of this litigation, if necessary.

Plaintiff alleges that she reviewed her credit reports "[i]n or about November of 2016" and further alleges that "her credit reports contain[ed] incorrect, inaccurate and damaging information." *Id.* at ¶ 14. Plaintiff specifically alleges that she "was shocked to learn upon review of her credit reports that Defendants had reported that the alleged medical bill with Defendant Dean concerned an 'Original Loan Amount' of '$4,457,' [and that] there was no mention whatsoever of any medical arrearage or debt." *Id.* at 16. Plaintiff alleges that her medical debt was reported as an installment loan to the credit reporting agencies. *Id.* at ¶¶ 17-18.

"In or about November, 2016 Plaintiff retained legal counsel." *Id.* at ¶ 21. Plaintiff's counsel communicated with State Collection's agents by phone and by "confirmatory letter" on December 14, 2016. *Id.* at ¶¶ 22-23. Plaintiff asserts that she "received a letter from Defendant State Collection dated December 19, 2016 acknowledging receipt of Plaintiff's December 14 letter and Plaintiff's request(ed) documentation supporting the debt." *Id.* at ¶ 25. That allegation is factually inaccurate. State Collection sent a copy of the letter referenced in paragraph 25 of the complaint directly to Plaintiff's attorney, Kevin Giebel. *See* Affidavit of Marc Soderbloom ¶ 3; Ex. A.[3]

[3] "On a motion to dismiss, the court may consider, in addition to the pleadings, materials embraced by the pleadings and materials that are part of the public record." *Carlson v. Arrowhead Concrete Works, Inc.*, 375 F.Supp.2d 835, 838 (D. Minn. 2005) (Kyle, J.) (internal quotation marks and bracketing omitted and citing *In re K-tel Int'l Sec. Litig.*, 300 F.3d 881, 889 (8th Cir. 2002)).

In the December 19, 2016, letter to Plaintiff's counsel, State Collection asked Plaintiff to execute a HIPAA release. Pl. Compl. ¶ 25; Soderbloom Aff. Ex. A. Plaintiff executed and returned the release to State Collection on or about January 10, 2017. Pl. Compl. ¶ 26. State Collection did not provide any additional documents to Plaintiff or her counsel. *Id.* at ¶¶ 27, 29.

In or around February 2017, Plaintiff's counsel again contacted State Collection's agents by phone. *Id.* at ¶ 28. Plaintiff alleges she thereafter "proceeded to contact the credit bureaus directly and demand redaction of the incorrect reported information …." *Id.* at ¶ 30. Those contacts have evidently resulted in two of the three major credit reporting agencies removing the subject reporting from Plaintiff's credit reports. *Id.*

Plaintiff brings claims against Defendants under the FCRA, FDCPA, and Minnesota common law. *Id.* at ¶¶ 32, 36-61.

ARGUMENT

I. LEGAL STANDARD ON RULE 12(B)(6) MOTION TO DISMISS

Rule 8 requires a plaintiff to set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint—nothing more, nothing less. *See, e.g., Morrison v. Moneygram Interns., Inc.*, 607 F.Supp.2d 1033, 1055 (D. Minn. 2009) (Schiltz, J.). "To avoid dismissal, a complaint must include 'enough facts to state a claim that is plausible on its face.'" *AW v. Preferred Platinum Plan, Inc.*, 923 F.Supp.2d 1168, 1170 (D. Minn. 2013) (Kyle, J.) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Bare "labels and conclusions," and "formulaic recitation[s] of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Instead, the plaintiff "must set forth sufficient facts to 'nudge the claim across the line from conceivable to plausible.'" *Preferred Platinum Plan, Inc.*, 923 F.Supp.2d at, 1170 (internal bracketing omitted and quoting *Twombly*, 550 U.S. at 570).

Although the motion-to-dismiss analysis does not set forth a "probability requirement," the plaintiff must plead "more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Well-pled, specific factual allegations must be accepted as true on a Rule 12(b)(6) motion. *Brown v. Medtronic, Inc.*, 628 F.3d 451, 459 (8th Cir. 2010). Legal conclusions need not be accepted as true. *Id*.

The courts construe pleadings liberally and the complaint's allegations and the reasonable inferences that can be reasonably drawn therefrom are construed in "the light most favorable to the non-moving party." *Preferred Platinum Plan, Inc.*, 923 F.Supp.2d at 1170 (citing *Iqbal*, at 678; *Twombly* at 556).

II. PLAINTIFF FAILS TO STATE A PLAUSIBLE CLAIM UNDER THE FCRA.

Plaintiff asserts that Defendants violated the FCRA by reporting that the debt she owes to Dean Clinic "concerned an 'Original Loan Amount' of '$4,457.00'" with "no mention whatsoever of any medical arrearage or debt." Pl. Compl. ¶ 16. Plaintiff further alleges that Defendants' reporting included reference to "delinquent 'installments,'" which was "unequivocally false," and was "grossly prejudicial and inaccurate, and a violation of the FCRA." *Id.* at ¶¶ 17-19. Plaintiff does not cite a particular subsection of the FCRA upon which her claim to relief is based. *See gen.* Pl. Compl.

Plaintiff asserts, without any factual support, that State Collection is a "consumer reporting agency" as that term is defined under the FCRA. *Id.* at ¶ 5; 15 U.S.C. § 1681a(f). Nothing in the complaint supports this allegation and legal conclusion. Indeed, Plaintiff's allegations concerning State Collection's allegedly improper "reporting" of information related to the debt she owes Dean Clinic (*see* Pl. Compl. ¶¶ 8, 17, 19, 20, 23-24, 28, 33) alone confirms that State Collection is actually a data furnisher. *See* Pl. Compl. ¶¶ 38-39 (alleging Defendants "furnished false and deceptive information relating to Plaintiff to a consumer reporting agency.").

Plaintiff's legal conclusion, unsupported by—indeed, contradicted by—the balance of the facts pled in the complaint, is not entitled to the presumption of truth on this motion. Defendants accordingly proceed with this analysis as though State Collection has been characterized as a data furnisher, not a credit reporting agency.

A. Plaintiff Does Not State a Claim Under § 1681s-2(a).

The FCRA imposes certain requirements on data furnishers concerning the accuracy of information they furnish about consumers to the credit reporting agencies. *See* 15 U.S.C. § 1681s-2(a). Those requirements include "(1) the duty to provide accurate information; and (2) the duty to undertake an investigation upon receipt of a notice of dispute regarding credit information that is furnished." *Yutesler v. Sears Roebuck and Co.*, 263 F.Supp.2d 1209, 1210 (D. Minn. 2003) (Frank, J.)

A consumer may lodge a dispute directly with a data furnisher regarding information the furnisher has provided to a credit reporting agency. *See* 15 U.S.C. § 1681s-2(a)(8); 12 C.F.R. § 222.43. After receiving a direct dispute the data furnisher is obligated, under certain circumstances, to conduct "a reasonable investigation …." *Id.*

The FCRA creates no private cause of action for a furnisher's alleged breach of the first requirement. In other words, there is no private cause of action even assuming inaccurate information was reported about a consumer to a credit reporting agency. *See* 15 U.S.C. § 1681s-2(d) (private enforcement of FCRA subsection described in paragraphs 1 and 3 of subsection (c), including requirements imposed on data furnishers by 15 U.S.C. § 1681s-2(a), are prohibited); *see also Yutesler*, 263 F.Supp.2d at 1210-11 ("The duties imposed by Section 1681s-2(a) are not subject to private rights of action by virtue of 15 U.S.C. § 1681s-2(d).").

A consumer also has no private right of action based on a data furnisher's alleged failure to perform a reasonable investigation after receiving a dispute directly from a consumer. *See, e.g., Seungtae Kim v. BMW Financial Servs., NA, LLC*, 142 F.Supp.3d 935, 948 (C.D. Cal. 2015) (quotation omitted and citing *Gustafson v. Experian Info. Solutions, Inc.*, No. 14-cv-01453-ODW (Ex), 2014 WL 2115210, at *2 (C.D. Cal. May 21, 2014) ("a consumer has no ability to bring suit against a furnisher for failure to conduct a reasonable investigation when a consumer disputes the information directly with the furnisher. Enforcement of, among others, § 1691s-2(a) is left to federal and state agencies and officials ….").

Plaintiff alleges she disputed the Dean Clinic debt directly to State Collection. Pl. Compl. ¶¶ 23-24. She does not allege that State Collection failed to perform a reasonable investigation of her dispute, as required by § 1681s-2(a)(8) and 12 C.F.R. § 222.43. Even if she had, no private cause of action is available to Plaintiff under § 1681s-2(a). Her FCRA claims therefore fail as a matter of law.

B. Plaintiff Does Not State a Claim Under § 1681s-2(b).

Though it remains an open question within the Eighth Circuit, most Circuits have determined that § 1681s-2(b) does create a private right of action for a furnisher's breach of the second requirement by failing to perform an investigation after receipt of a notice of dispute from a credit reporting agency. *See Ilodianya v. Capital One Bank USA NA*, 853 F.Supp.2d 772, 774 (E.D. Ark. 2012) (holding no private right of action under § 1681s-2(a), collecting cases conversely holding that § 1681s-2(b) does create private right of action).

As a result, "[t]o state a claim under the FCRA, a plaintiff must show that: (1) he found an inaccuracy in his credit report; (2) he notified a credit reporting agency; (3) the credit reporting agency notified the furnisher of the information about the dispute; and (4) the furnisher failed to investigate the inaccuracies or otherwise failed to comply with the requirements of 15 U.S.C. § 1681s-2(b)(1)(A)-(E)." *Corns v. Residential Credit Solutions, Inc.*, No. 15-cv-1233-GMN-VCF, 2016 U.S. Dist. LEXIS 27864, at *4 (D. Nev. Mar. 3, 2016) (citing *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 114, 1154 (9th Cir. 2009)); *accord Yutesler*, 263 F.Supp.2d 1209.

Plaintiff alleges that she found an inaccuracy in her credit report. Pl. Compl. ¶¶ 14-16. Plaintiff further alleges that she contacted "the credit bureaus directly and demand[ed] redaction of the incorrect reported information …." *Id.* at ¶ 30. Plaintiff does not plead that any credit reporting agency notified Defendants about the dispute. She also does not plead that Defendants failed to investigate the alleged dispute or otherwise failed to comply with the requirements set forth in § 1681s-2(b).

Plaintiff's purported FCRA claim accordingly fails as a matter of law.

III. PLAINTIFF'S ALLEGED TORTIOUS INTEFERENCE AND DEFAMATION CLAIMS ARE PREEMPTED BY THE FCRA.

Plaintiff next asserts that Defendants have interfered with her "valid credit expectancy." *Id.* ¶¶ 44-50. She also asserts that Defendants have "defamed" her. *Id.* at ¶¶ 51-61.

The FCRA preempts "[s]tate law privacy causes of action, such as defamation and invasion of privacy…unless plaintiff can show that the disclosures were made with malice or willful intent to injure." *Olwell v. Med. Info. Bureau*, No. 01-1481, 2003 WL 79035, at *5-6 (D. Minn. Jan. 7, 2003) (Tunheim, J.); 15 U.S.C. § 1691h(e). The Act also preempts "interference with economic expectancy" and "interference with contractual relation" claims. *see Edeh v. Equifax Information Servs., LLC*, No. 11-cv-2671, 2012 U.S. Dist. LEXIS 136779, at *1 (SRN/JSM) (D. Minn. Sep. 25, 2012) (Nelson, J.) (FCRA preempts causes of action "in the nature of" defamation, including, "for example, Plaintiff's claim that Equifax negligently interfered either with his economic expectancy or with some contractual relation is clearly preempted.").

Plaintiff does not allege that Defendants acted maliciously or with willful intent to injure her as to her alleged tortious interference claim. *See* Pl. Compl ¶¶ 44-50. Plaintiff offers nothing more than a mere recitation of the elements of a common-law claim for defamation to suggest that Defendants acted maliciously or with willful intent to injure with respect to her alleged defamation claim. *Id.* at ¶ 60 ("Defendants statements and provision of false information were made and published willfully, wantonly, maliciously and in complete disregard for and contract to the rights of Plaintiff, at law and in equity."). Plaintiff's pleadings are insufficient to avoid preemption under the FCRA. *Preferred Platinum Plan, Inc.*, at 1170.

IV. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE FDCPA.

Plaintiff next asserts claims under "numerous and multiple provisions of the FDCPA, including but not limited to 15 U.S.C. § 1692 et seq. including without limitation, § 1692e(2), § 1692(2)(a) [sic], § 1692e(8), § 1692e(10), § 1692e(11), § 1692f(1) and § 1692(g), amongst others." Pl. Compl. ¶ 32. However, Plaintiff fails to state a claim for relief under the FDCPA that is plausible on its face and Defendants seek dismissal of Plaintiff's alleged FDCPA claims under Rule 12(b)(6) for three reasons.

- First, Plaintiff does not allege that Dean Clinic is a "debt collector" subject to the Act;

- Second, Plaintiff fails to set forth facts sufficient to support her alleged § 1692e(8) claim (failure to report a debt as disputed), § 1692e(11) claim (failure to give the "mini-Miranda"), § 1692f(1) claim (collection of any amounts not authorized by law or contract, such as interest), or her § 1692g claim (validation and verification of debts); and

- Third, Plaintiff has not pled that any alleged violation of § 1692e or § 1692f was material.

Defendants therefore submit that dismissal of Plaintiff's FDCPA claims is appropriate.

A. Plaintiff's FDCPA Claims Asserted Against Dean Clinic Fail as a Matter of Law Because Dean Clinic is Not a "Debt Collector."

In her complaint, Plaintiff identifies only State Collection as a "debt collector" subject to the FDCPA. Pl. Compl. ¶¶ 5, 7. Plaintiff does not allege that Dean Clinic is a "debt collector" for purposes of the Act. She nonetheless asserts that "the foregoing acts and omissions of each and every Defendant and their agents constitute numerous and multiple violations of the FDCPA." *Id*. at ¶¶ 36-37.

The FDCPA only applies to "debt collectors;" it does not apply to creditors such as Dean Clinic. 15 U.S.C. § 1692a(4) (defining "creditor" as "any person who offers or extends credit creating a debt or to whom a debt is owed …."), § 1692a(6) (defining "debt collector"); *see also Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 108 (6th Cir. 1996) (internal bracketing and quotation marks omitted, emphasis in original) ("Section 1692k imposes liability only on a *debt collector* who fails to comply with a provision of [the FDCPA] …. The plaintiff would have us impose liability on non-debt collectors too. This we decline to do.").

Plaintiff asserts that Dean Clinic is "liable to Plaintiff through the legal doctrine of 'Respondeat Superior' for the…[alleged] acts…committed by all of the individual Defendants," including State Collection. Pl. Compl. ¶¶ 10, 12. Plaintiff's conclusion is not correct. A "creditor" cannot be vicariously liable under the FDCPA for the alleged actions of a collection agency it retains to collect a debt where the creditor is not itself a "debt collector." *See Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 404-05 (3d Cir. 2000); *Worch v. Wolpoff & Abrahamson, LLP*, 477 F.Supp.2d 1015, 1019 (E.D. Mo. 2007) ("Because Grillion is indeed a process server and not a debt collector he is not liable to Plaintiffs under the FDCPA and there is no vicarious liability under the doctrine of respondeat superior."); *Deutsche Bank Trust Co. Americas v. Garst*, 989 F.Supp.2d 1194, 1202 (N.D. Ala. 2013) (non-debt-collector may not be held vicariously liable for actions of debt collector); *cf Pettit v. Retrieval Masters Creditor Bureau, Inc.*, 211 F.3d 1057, 1059 (7th Cir. 2000) (respondeat superior applicable where the superior is also a debt collector under the Act); *Boldon v. Messerli & Kramer, PA*, 92 F.Supp.3d 924, 934 (D. Minn. 2015) (Frank, J.) (vicarious liability may apply in attorney-client context if both attorney and client qualify as debt collectors).

Plaintiff has not alleged that Dean Clinic is a debt collector. Dean Clinic therefore cannot be vicariously liable to Plaintiff under the FDCPA for the alleged conduct of State Collection.

B. Plaintiff Does Not Plead Sufficient Facts to Establish a Plausible Claim under § 1692e(8) § 1692e(11), § 1692f(1), or § 1692g.

Plaintiff does not explain what asserted conduct allegedly violated which section of the FDCPA. *See gen.* Pl. Compl. Rule 8 requires more. *See, e.g., Hollis v. Northland Group, Inc.*, No. 08-cv-4985 (DWF/FLN) (D. Minn. Feb. 2, 2009) (Frank, J.) ("Although the complaint need not contain 'detailed factual allegations,' it must contain facts with enough specificity 'to raise a right to relief above the speculative level. This standard 'calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the claim.'") (internal bracketing omitted and quoting *Twombly*, at 1964-65); *Erickson v. Performant Recovery, Inc.*, No. 12-cv-2818 (ADM/FLN) (D. Minn. June 25, 2013) (Montgomery, J.) (dismissing FDCPA complaint for plaintiff's failure to plead § 1692d claim with sufficient specificity)).

The blanket averments contained in Plaintiff's complaint, even when pieced together in a light most favorable to Plaintiff, do not set forth plausible violations of § 1692e(8), §1692e(11), § 1692f(1), or § 1692g.

1. Plaintiff has not sufficiently pled that Defendants failed to report a debt as disputed.

Section 1692e(8) of the FDCPA provides that a debt collector may not "communicat[e] or threaten[] to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed." 15 U.S.C. § 1692e(8).

However, the FDCPA places no affirmative obligation upon a debt collector, after becoming aware of a dispute, to update information it has previously reported to a credit reporting agency. On this point the Eight Circuit Court of appeals explained:

> [Plaintiff] assert[s] that § 1692e(8) imposed an affirmative duty on [debt collectors] to disclose that he had disputed the debt. He cites no case supporting this contention, and we reject it. Section 1692e generally prohibits "false, deceptive, or misleading representation." Subsection 1692e(8) applies to the "communication" of "credit information." "Communication" is defined as "the conveying of information regarding a debt directly or indirectly to any person through any medium." Reading these provisions together, as we must, the relevance of the portion of § 1692e(8) upon which Wilhelm relies—"including the failure to communicate that a debt is disputed"—is rooted in the basic fraud law principle that, if a debt collector elects to communicate "credit information" about a consumer, it must not omit a piece of information that is always

> material, namely, that the consumer has disputed a particular debt. This interpretation is confirmed by the relevant part of the Federal Trade Commission's December 1988 Staff Commentary on the Fair Debt Collection Practices Act:
>
> > 1. Disputed debt. If a debt collector knows that a debt is disputed by the consumer … *and reports it to a credit bureau*, he must report it as disputed.
> >
> > 2. Post-report dispute. *When a debt collector learns of a dispute after reporting the debt to a credit bureau, the dispute need not also be reported*.

Wilhelm v. Credico, Inc., 519 F.3d 416, 418 (8th Cir. 2008) (citing FTC Staff Commentary, 53 Fed.Reg. 50097-02, 50106 (Dec. 13, 1988))).

Plaintiff asserts, "[u]pon information and belief," that Defendants[4] violated § 1692e(8) by "continu[ing] to allow the disputed information and debt to remain available to the public unchanged…not notify[ing] any of the credit bureaus or other credit reporters that Plaintiff disputed the alleged indebtedness and otherwise…not update[ing] its reporting of the alleged debt(s) to include the proper notations indicating that Plaintiff was disputing the alleged debts." Pl. Compl. ¶¶ 24, 32. She does not allege, however, that Defendants continued to actively report her debt to any credit reporting agency after learning of her dispute, without noting that the debt was disputed. Plaintiff's § 1692e(8) claim therefore fails as a matter of law. *See Wilhelm*, 519 F.3d at 418.

---

[4] In her complaint, Plaintiff identifies only State Collection as a "debt collector" subject to the FDCPA. Pl. Compl. ¶¶ 5, 7. She nonetheless asserts that "the foregoing acts and omissions of each and every Defendant and their agents constitute numerous and multiple violations of the FDCPA." *Id.* at ¶¶ 36-37. As noted *supra*, Dean Clinic is a "creditor" not subject to the FDCPA.

2. Plaintiff has not pled that Defendants did not give her the "mini-Miranda."

The FDCPA "requires debt collectors to meaningfully identify themselves and state that they are calling to collect a debt…in communications with a consumer …." *Zortman v. JC Christensen & Assoc., Inc.*, 870 F.Supp.2d 694, 700 (D. Minn. 2012) (emphasis added) (Ericksen, J.); 15 U.S.C. §§ 1692d (6), 1692e(11). For purposes of the FDCPA, a "consumer" is "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3).

Plaintiff asserts that her attorney communicated with Defendant State Collection on several occasions. Pl. Compl. ¶¶ 22-23, 28. She also alleges she received a letter from State Collection. Pl. Compl. ¶ 25. The letter allegation is factually inaccurate. State Collection sent a copy of the letter referenced in paragraph 25 of the complaint directly to Plaintiff's attorney, Kevin Giebel, who, on information and belief, is also Plaintiff's father. *See* Soderbloom Aff. ¶ 3; Ex. A.

Plaintiff does not allege that any Defendant failed to give anyone the mini-Miranda. *See gen.* Pl. Compl. This alone warrants dismissal of Plaintiff's § 1692e(11) claim.

Even if Plaintiff had alleged that State Collection failed to give her attorney the mini-Miranda, that claim would still fail because "a representation by a debt collector that would be unlikely to deceive a competent lawyer, even if he is not a specialist in consumer debt law, should not be actionable." *Evory v. RJM Acquisitions Funding, LLC*, 505 F.3d 769, 775 (7th Cir. 2007); *see also Johnson v. Admiral Invs., LLC*, No. 16-cv-

452 (MJD/TNL), 2017 U.S. Dist. LEXIS 15483, at *8 (D. Minn. Feb. 2, 2017) (Davis, J.) ("[a] competent lawyer would look into whether this amount is correct, and if not correct, would appropriately challenge the amount sought by the debt collector.").

Plaintiff has not alleged that her attorney was deceived by any communications with State Collection. And Plaintiff does not allege any direct communications with State Collection. A competent attorney would not be deceived by any of the communications asserted in the complaint, nor would such attorney fail to appreciate that he was communicating with a debt collector during any of those alleged contacts. Dismissal of Plaintiff's alleged § 1692e(11) claim therefore is appropriate.

3. Plaintiff has not sufficiently pled that Defendants attempted to collect any amount not authorized by law or contract.

The FDCPA specifically precludes "[t]he collection of any amount (including interest, fee, charge, or expense incidental to the principal obligation) unless the amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1).

The medical services Dean Clinic rendered to Plaintiff presumably took place in Wisconsin. *See* Pl. Compl. ¶ 7 ("Defendant Dean is a Wisconsin Corporation …."). Under Wisconsin law, a "creditor is entitled to interest [on a liquidated claim] from the time payment is due by the terms of the contract and, if no such time is specified, then from the time a demand was made and, if no demand was made prior to the time of commencement of action, then from that time." *Estreen v. Bluhm*, 255 N.W.2d 473, 482

(Wis. 1977) (citing *In re Octonto Co. State Bank*, 6 N.W.2d 353 (Wis. 1942)). This rule is codified at Wis. Stat. section 138.04, which provides:

> The legal rate of interest upon the loan or forbearance of any money, goods or things in action shall be $5 upon the $100 for one year and according to that rate for a greater or less sum or for a longer or shorter time; but parties may contract for the payment and receipt of a rate of interest not exceeding the rate allowed [under Wisconsin statutes], in which case such rate shall be clearly expressed in writing.

Wis. Stat. § 138.04.

Plaintiff alleges Defendants violated § 1692f(1) by "stat[ing] that the 'loan' was in arrears in the amount of $4,772.00, which has now allegedly accrued [sic] $4,791.03 including on-going 'interest' and other late charges raising the total alleged arrearage to $4,791.03, for which the Defendants have no legal right to assess or seek collection." Pl. Compl. ¶ 20. Plaintiff offers nothing more than the recitation of her attorney in a "confirmatory letter" to support her allegation that improper interest or "late charges" were added to her debt. *Id*. at ¶ 23.

A debt collector complies with the FDCPA when it attempts to collect interest accrued on a debt, calculated at the legal rate of interest permitted by state law. 15 U.S.C. § 1692f(1) ("unless such amount is expressly…permitted by law.). Plaintiff has not alleged that any interest that accrued on her debt exceeded the permissible legal interest rate. Plaintiff's § 1692f(1) claim that Defendants allegedly attempted to collect accrued interest on her debt therefore fails as a matter of law.

Plaintiff also alleges that Defendants added "late fees and other charges" to the debt she owes Dean Clinic. Pl. Compl. ¶¶ 20, 23. Her only basis for this assertion is the "confirmatory letter" her attorney sent to State Collection, which purports to recount a conversation her attorney had with one of State Collection's agents. *Id*. at ¶ 23. There is no actual averment in the complaint, aside from the implicit suggestion contained in the "confirmatory letter," that either Defendant added a "late charge" or any other amount to Plaintiff's debt to Dean Clinic. The complaint offers no facts regarding what the nature of the alleged charge or impermissible fee might be, or in what amount such charge or fee was added to Plaintiff's debt.

This allegation therefore lacks sufficient specificity to entitle it to the presumption of truth on this Rule 12(b)(6) motion. Plaintiff's unsupported legal conclusion on this point is also insufficient to move Plaintiff's § 1692f(1) claim across the "plausibility" threshold. To the extent this claim is predicated on the inclusion of an unauthorized "late fee" or other charge, it should be dismissed.

4. Plaintiff has not adequately pled any claim under any provision of the FDCPA that pertains to the validation or verification of debts.

The FDCPA requires debt collectors to provide certain initial notices to consumers when they attempt to collect debts. Those disclosures include the "validation notice." *See Read v. Messerli & Kramer, P.A.*, No. 11-cv-3729 (JNE/FLN), 2012 U.S. Dist. LEXIS 58224, at *4-5 (D. Minn. Apr. 26, 2012) (Ericksen, J.); 15 U.S.C. § 1692g(a)(1)-(5) (detailing specific, required elements of the notice).

Within the validation notice a debt collector is specifically required to notify the consumer that:

> [U]nless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> [and]
>
> [I]f the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of the judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector.

5 U.S.C. § 1692g(a)(3)-(4) (emphasis added).

If the consumer requests verification of the debt—within the thirty-day validation period—the debt collector is required to respond.[5]

Plaintiff alleges that her attorney notified State Collection on December 14, 2016, that Plaintiff disputed the debt. Pl. Compl. ¶¶ 22-24. But Plaintiff does not allege that this dispute occurred within the 30-day validation period. Indeed, Plaintiff alleges no facts regarding when Defendants began their efforts to collect the debt. Plaintiff's § 1692g claim accordingly fails as a matter of law. *See, e.g., Mahon v. Credit Bureau, Inc.*, 171 F.3d 1197, 1203 (9th Cir. 1999) (request for verification outside 30-day validation period "did not trigger any obligation on the part of the [debt collector] to verify the debt."); *see also Senftle v. Landau*, 390 F.Supp.2d 463, 475 (D. Md. 2005) (no duty to verify if consumer does not dispute within 30-day validation period); *McCammon v.*

---

[5] It is also permissible for the debt collector to close the account and cease collection activity in response to a consumer's request for verification. *See, e.g., Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 940 (9th Cir. 2007) ("It would make little sense to impose an independent obligation to verify an alleged debt on a collector who, for example, decides a disputed debt is not worth the effort and chooses to close or sell the account.").

Bibler, Newman & Reynolds, P.A., 515 F.Supp.2d 1220, 1225-26 (D. Kan. 2007) (denying plaintiff's motion for summary judgment on claim that debt collector violated the FDCPA by failing to investigate the debt because plaintiff did not request verification within 30-day validation period).

C. Plaintiff Has Not Pled a Fundamental Component of a § 1692e or § 1692 Claim: Materiality.

Plaintiff does not allege that any of the claims she attempts to assert under § 1692e or § 1692f materially impacted her ability to intelligently choose a response to Defendants' attempts to collect her debt. Thus, in addition to Plaintiff's failure to set forth specific facts to support the FDCPA claims discussed in Section IV.A.1-4, *supra*, all of Plaintiff's FDCPA claims brought under § 1692e and § 1692f fail as a matter of law on materiality grounds.

1. "Materiality" is an integral part of the "unsophisticated consumer" standard.

Congress enacted the FDCPA to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). Because the Act prohibits debt collectors from making false, deceptive, or misleading statements or from employing unfair on unconscionable means to collect. 15 U.S.C. §§ 1692e, 1692f.

The courts analyze claims asserted under § 1692e and § 1692f from the vantage of the "unsophisticated consumer." *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001). The unsophisticated consumer standard is designed to "protect consumers of below average sophistication or intelligence without [being tied] to the very last rung on the sophistication ladder." *Strand v. Diversified Collection Serv.*, 380 F.3d

316, 317 (8th Cir. 2004) (internal quotation marks omitted and citing *Duffy v. Landberg*, 215 F.3d 871, 874 (8th Cir. 2000)). Although designed to protect the "uninformed or naive consumer," the unsophisticated consumer standard "also contains an objective element of reasonableness to protect debt collectors from liability for peculiar interpretations of collection letters" and other collection efforts. *Id.* at 317-18 (citing *Peters v. Gen. Serv. Bureau, Inc.*, 277 F.3d 1051, 1054-55 (8th Cir. 2002)).

Consistent with the Act's inclusion of an "objective element of reasonableness," an alleged violation of § 1692e or § 1692f is actionable only to the extent that the violation was "material." Judge Easterbrook examined this requirement in depth in *Hahn v. Triumph P'Ships, LLC*, explaining, as a threshold matter, that "[m]ateriality is an ordinary element of any federal claim based on a false or misleading statement." 557 F.3d 755, 757 (7th Cir. 2009) (citing *Carter v. United States*, 530 U.S. 255 (2000); *Neder v. United States*, 527 U.S. 1 (1999)).

As applied to the FDCPA, the *Hahn* court held there was no "reason why materiality should not be equally required in an action based on § 1692e. The statute is designed to provide information that helps consumers choose intelligently, and by definition immaterial information neither contributes to that objective (if the statement is true) nor undermines it (if the statement is incorrect)." *Hahn*, 557 F.3d at 757-58 (citing *Peters v. Gen. Serv. Bureau, Inc.*, 277 F.3d 1051, 1056 (8th Cir. 2002); *Evory v. RJM Acquisitions Funding, L.L.C.*, 505 F.3d 769, 776-77 (7th Cir. 2007)). Stated another way, "[i]f a statement would not mislead the unsophisticated consumer, it does not violate the

FDCPA—even if it is false in some technical sense." *Wahl v. Midland Credit Mgmt.*, No. 08-1517, 2009 U.S. App. LEXIS 3530, at *7 (7th Cir. Feb. 23, 2009).

The Eighth Circuit has adopted the "materiality" requirement. *See Powers v. Credit Mgmt. Servs., Inc.*, 776 F.3d 567, 571 (8th Cir. 2015); *McIvor v. Credit Control Servs. Inc.*, 773 F.3d 909, 913 (8th Cir. 2014) ("Even a literally false statement does not violate § 1692e if it would not mislead the recipient."). So have the Third, Fourth, Sixth, Seventh, and Ninth Circuits. *See Jensen v. Pressler & Pressler*, 791 F.3d 413 (3d Cir. 2015); *Elyazidi v. SunTrust Bank*, 780 F.3d 227 (4th Cir. 2015); *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588 (6th Cir. 2009); *Hahn*, 557 F.3d 757-58; *Donoahue v. Quick Collect, Inc.*, 592 F.3d 1027 (9th Cir. 2010).

This Court recently found the materiality requirement applicable to both § 1692e and § 1692f claims. *See Grunwald v. Midland Funding LLC,* 172 F.Supp.3d 1050 (D. Minn. 2016) (Kyle, J.). There, the Court noted that "a representation is material if it frustrates a consumer's ability to intelligently choose his or her response." *Id.* at 1054 (internal bracketing and quotations omitted, citing *Salaimeh v. Messerli & Kramer, P.A.*, No. 13-cv-3201, 2014 U.S. Dist. LEXIS, at *3 (D. Minn. Nov. 25, 2014) (Doty, J.)).

2. Plaintiff has not pled any facts to suggest that any alleged "misrepresentation" Defendants made to her was material.

Plaintiff does not allege that she ever communicated directly with Defendants about the debt.[6] *See gen.* Pl. Compl. Her first allegation concerning the debt was "[i]n or

[6] State Collection sent a copy of the letter referenced in paragraph 25 of the complaint directly to Plaintiff's attorney, Kevin Giebel, not to Plaintiff, as she alleges in the complaint. *See* Soderbloom Aff. ¶ 3; Ex. A.

about November 2016," when she "review[ed] her credit reports …." *Id.* at ¶¶ 14, 16. From there, Plaintiff alleges that she retained counsel (her father), who then communicated with State Collection. *Id.* at ¶¶ 21-24, 28.

Plaintiff does not allege that Defendants made any representation to her—much less a misleading, deceptive, or unfair representation—that impacted her ability to intelligently choose her response. That is, Plaintiff has not pled that any alleged misrepresentation or false statement in this case was material. Therefore, to the extent Plaintiff claims Defendants made any such representation or statement directly to her that somehow ran afoul of § 1692e or § 1692f, those claims fail as a matter of law. *Grunwald*, 172 F.Supp.3d at 1054-55.

3. Defendants alleged representations and statements made directly to Plaintiff's attorney would not mislead or deceive a competent attorney.

To the extent Plaintiff asserts that any alleged representation or statement made to her attorney violated § 1692e or § 1692f, the materiality of those claims are not analyzed from the vantage of the unsophisticated consumer, but through the lens of the competent attorney. *See Bravo v. Midland Credit Mgmt., Inc.*, 812 F.3d 599, 603 (7th Cir. 2016) (applying competent attorney standard in analyzing § 1692e claim, gathering other 7th Circuit opinions consistent with that analysis, and affirming dismissal of plaintiff's complaint on debt collector's 12(b)(6) motion); *accord Powers v. Midland Credit Mgmt. Servs., Inc.*, 776 F.3d 567, 574 (8th Cir. 2015) ("we agree with other circuits that the unsophisticated consumer standard is inappropriate for judging communications with lawyers.") (internal quotation marks and citations omitted). This standard presumes the attorney will perform *some* level of investigation into the debt collector's representation or statement. *See Janetos v. Fulton Friedman & Gullace, LLP*, No. 12-cv-1473, 2015 U.S. Dist. LEXIS 48774, at *16 (N.D. Ill. Apr. 13, 2015) *rev'd on other grounds at* 825 F.3d 317 (7th Cir. 2016) and citing *Evory*, 505 F.3d at 774-75.

The question then, with respect to the alleged interactions between Defendants allegedly and Plaintiff's attorney, is: Would those communications affect the competent attorney's ability to intelligently choose his response to the debt collector after performing some level of investigation into the representations or statements? The answer here, based on the averments set forth in Plaintiff's complaint, is "no."

The "confirmatory letter" Plaintiff's counsel sent to State Collection supports this conclusion. *See* Pl. Compl. ¶ 23. In that correspondence, Plaintiff's counsel suggested that he performed an investigation into the credit reporting of Plaintiff's debt to Dean Clinic. *Id*. ("We continue to investigate to arrive at the true numbers, if any."). Based on that investigation, Plaintiff's counsel saw that Plaintiff's debt arose from medical treatment she obtained from Dean Clinic. *Id*. After conducting his investigation, Plaintiff's counsel also apparently arrived at his conclusion that the debt included "interest and other late charges." *Id*.

The "confirmatory letter" alone demonstrates that Plaintiff's counsel identified, after investigation, what he considered to be Defendants' false or misleading representations and statements concerning Plaintiff's debt. Having identified those alleged communications as such, he cannot now claim he was deceived or was unable to intelligently respond. Indeed, the "confirmatory letter" arguably constitutes an "intelligent response" to Defendants' collection efforts, which Plaintiff's counsel (wrongfully) identified as false and misleading.

A competent attorney would not have been deceived or misled by Defendants' purported representations and statements. Plaintiff's § 1692e and § 1692f claims predicated upon such representations and statements Defendants made directly to Plaintiff's counsel therefore fail as a matter of law.

CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court dismiss Plaintiff's alleged FCRA, FDCPA, and Minnesota common-law claims.

BASSFORD REMELE
A Professional Association

Dated: April 4, 2017

By s/Patrick D. Newman
Michael A. Klutho (# 186302)
Patrick D. Newman (#395864)
100 South Fifth Street, Suite 1500
Minneapolis, Minnesota 55402-3707
Phone: (612) 333-3000
Fax: (612) 333-8829
Email: mklutho@bassford.com
pnewman@bassford.com

Attorneys for Defendants State Collection Service, Inc. and Dean Clinic and St. Mary's Hospital Accountable Care Organization, LLC